Petition

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No. A-288

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1981

Thomas Gage,
Petitioner,
vs.
Howard M. Wexler, Board Member of San Francisco Redevelopment Agency, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the failure of plaintiff and his counsel to secure national television coverage with respect to plaintiff's civil rights claims supports a summary dismissal of plaintiff's claims under Rule 12(b)(6) and supports a finding of a Rule 11 violation and an award of attorneys fees against plaintiff and his counsel?

2. Whether the Court has discretion in a civil rights case, where defendants include attorneys known to the Court, to assume that defendants acted in good faith in ruling on Rule 12(b)(6) motion?

3. Whether the Court has discretion, in a civil rights case, to ignore portions of plaintiff's verified complaints in dismissing plaintiff's case pursuant to Rule 12(b)(6)?

4. Whether plaintiff's allegations of a continual conspiracy to deprive plaintiff of his constitutional rights overcomes the statute of limitations at the pleading stage?

PARTIES TO THIS PETITION

The petitioner herein is Thomas Gage, plaintiff in the civil rights action in the courts below. The respondents are: Howard M. Wexler, Board Member of the San Francisco Redevelopment Agency; Joan-Marie Shelley, Board Member of the San Francisco Redevelopment Agency; Dian Blomquist, Board Member of the San Francisco Redevelopment Agency; Rubin Glickman, Board Member of the San Francisco Redevelopment Agency; Walter F. Kaplan, Board Member of the San Francisco Redevelopment Agency; Melvin D. Lee, Board Member of the San Francisco

Redevelopment Agency; Hannibal A. Williams, Board Member of the San Francisco Redevelopment Agency; Wilbur Hamilton, Executive Director of the San Francisco Redevelopment Agency; Steven Nord; Richard Thomas; the San Francisco Redevelopment Agency, defendants in the courts below.

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Petitioner and plaintiff, Thomas Gage, prays that a writ of certiorari issue to review the jugdment of the United States Court of Appeals for the

Ninth Circuit entered in this case on April 22, 1981.

I

OPINIONS BELOW

The order of the Ninth Circuit Court of Appeals denying the petition for rehearing is contained in Appendix A. The memorandum of opinion of the Court of Appeal appears in Appendix B. The District Court's Judgement is contained in Appendix C. The District Court's memorandum opinion, dated June 13, 1979, appears in Appendix D and the District Court's memorandum of opinion, dated December 7, 1978, appears in Appendix E.

II

JURISDICTIONAL STATEMENT

By its Memorandum, filed and entered on April 22, 1981, the Ninth Circuit Court of Appeals affirmed the dismissal of civil rights action brought under 42

U.S.C. §§ 1981, 1982, 1983, 1985(2), (3) and 1986 (Appendix B). Judgment was filed on July 28, 1981.

On July 8, 1981, the Petition for Rehearing was denied (Appendix A). On October 8, 1981, the Supreme Court extended the time to file the petition for certiorari to and including October 20, 1981.

This Court's jurisdiction is invoked under Section 1254(1) of Title 28, United States Code.

III

RELEVANT STATUTES

The statutes relevant to the questions presented for review are 42 U.S.C. §§ 1981, 1982, 1983, 1985(2), (3), 1986 and Rule 12(b) and Rule 56(c) of the Federal Rules of Civil Procedure, the verbatim text of which is set forth in Appendix F.

IV

STATEMENT OF THE CASE

A. Nature of the Case

On March 8, 1978, Petitioner, Thomas Gage, (hereinafter "Gage") filed his verified complaint, which was amended and verified on June 21, 1978, alleging deprivation of civil rights (42 U.S.C. 1983), deprivation of equal rights under the law (42 U.S.C. 1981), deprivation of property rights (42 U.S.C. 1982), conspiracy to obstruct justice (42 U.S.C. 1985(2)), conspiracy to deprive equal protection (42 U.S.C. 1985(3)), neglect and/or refusal to prevent deprivation of civil rights (42 U.S.C 1986) and pendent claims of conversion, abuse of process, misappropriation of trade secrets and interference with economic advantage.

Named as defendants were Board Members of the San Francisco

Redevelopment Agency (hereinafter ("Agency") and its attorneys.

In substance, Gage's claims arise from his relationship with the Agency as a business tenant in the Western Addition section of San Francisco. In 1972, Gage organized the black businessmen of the Western Addition to demand benefits from the Agency under the federal urban renewal laws pertaining to business relocation.

The businessmen organized under the banner of the Business and Professional Improvement Association of the Western Addition, Inc. (hereinafter "B.P.I.A.") and named Gage as its president.

In 1973, having failed to secure their benefits under the urban renewal laws, the B.P.I.A. filed suit in the United States District Court for the Northern District of California,

B.P.I.A., et al. v. James T. Lynn, Sec. of HUD, et al., No. C-73-0422. Eventually, this case was settled with the Agency based on the Agency's promise that relocation benefits would be provided to the black businessmen of the Western Addition.

In June, 1973, Gage filed an action against the Agency alleging, inter alia, breach of contract, entitled Gage v. S.F.R.A., in the Superior Court of the City and County of San Francisco, No. 661-094, based on a written contract that Gage had with the Agency to relocate Gage's business.

Immediately after the lawsuits were commenced, in June, 1973, the Agency, through its in-house counsel, announced its intention to retaliate against Gage.

The Agency's retaliation against Gage for his successful organizing of black

businessmen has been achieved by a series of overt acts committed from 1973 through 1978. However, as alleged in Gage's verified first amended complaint, the conspiracy to retaliate against Gage by depriving him of his civil rights continues to this date. For instance, respondents have failed to comply with federal laws requiring permanent relocation of Gage's business; respondents continue to violate the Agreement of Settlement and Dismissal in B.P.I.A., et al., v. Lynn, et al.; the Agency continues to refuse to return Gage's business records wrongfully obtained in 1974; the Agency continues to violate federal and state laws prohibiting discrimination by discriminating against Gage because of his status as a black business tenant in the Western Addition.

Other overt acts committed by respondents in furtherance of the conspiracy to retaliate against Gage and deprive Gage of his civil rights include the removal of Gage's business records, which were to be used as documentary evidence in the action entitled Gage v. S.F.R.A.. In February, 1978, counsel for the Agency, without the consent of Gage, without subpoena, and without court approval, removed portions of Gage's property from a storage facility and misappropriated Gage's confidential communications, and additional business records. Both actions constituted violations of Gage's constitutional right to be free from unreasonable searches and seizures, and were done in furtherance of the conspiracy to retaliate against Gage.

The immediate effect of the charged conspiracy was the destruction of Gage's

business and interference with Gage's constitutional right of access to the courts. Other effects include serious psychological injury to Gage and his family.

B. The Course of the District Court Proceeding

Gage has effectively been precluded from his day in court since the filing of his civil rights claim. Before the defendants had filed an answer to Gage's claims, the District Court stayed all discovery and allowed defendants three months within which to file its motion to dismiss under Rule 12(b) of the Federal Rules of Civil Procedure.

Defendants' motion to dismiss included seventeen (17) exhibits attached to the affidavit of defendants' counsel and was based on Rule 12(b)(6) on the grounds

of failure to state a claim upon which relief could be granted.

It is undisputed that the District Court decided fact issues in granting defendants' motion to dismiss for failure to state a claim:

> "The Court (Judge Renfrew): Well, we certainly have a number of factual differences here. I don't know that they're material to this case, but it's very hard to--
>
> "Mr. Zeldin (defendants' counsel): Your Honor, we agree there are a lot of factual differences and most of them are either not material or have been decided by Your Honor in granting our motion to dismiss." (RT 51). (Emphasis added).

Defendants' counsel, Joel Zeldin, participated in the confiscation of Gage's property without due process in February, 1978. As an attorney, Zeldin had enough foresight to realize that his action would result in a violation of Gage's right to be free from unreasonable

searches and seizures. Zeldin admitted to the District Court that, before he conducted the search and seizure under the guise of a document inspection, in February, 1978, that:

> "Mr. Zeldin (defendants' counsel): We knew there would be problems." (RT 63). (Emphasis added).

Mysteriously, the District Court did not address the deprivation of Gage's property which occurred in February, 1978. The only plausible explanation for this omission is that the District Court assumed, contrary to the allegations contained in Gage's verified complaint, that defendants' counsel, Joel Zeldin, somehow acted in good faith when they confiscated Gage's property in February, 1978. The District Court's position was made clear at a hearing when it said:

> "The Court: Well, I don't know, I don't know this, but I

> have to rely upon representation of counsel, and defense counsel are known to the--that is, their firm is known to the court, and--and until it's shown to the contrary, I'll assume they've acted in good faith." (RT 21). (Emphasis added).

The District Court never allowed Gage the opportunity to rebut the District Court's pre-existing assumption of good faith. Instead, the District Court ruled that Gage's complaint had been filed in bad faith and that both Gage and Gage's counsel were to pay defendants' attorneys fees. One of the explanations given by the District Court for its rulings was that it felt that Gage's case was not a "strong" case because it did not receive national television coverage.

> "The Court: --Boy, you must not--you must be a very literal person and not very imaginative, because I can imagine a far better case and I'm sure you can, too. Wouldn't it be good to have your rights taken away and have that on national television and all kinds

> of things like that? I can think of a lot of better cases and I'm sure you can, too.
>
> "Mr. Dombroski: Well, the point is, Your Honor--
>
> "The Court: This is not a strong case." (RT 10-11).

The District Court Memorandum of Opinion, dated December 8, 1978, discussing Gage's claims for failure to state a claim, made no reference to the statute of limitations. It also failed to address numerous allegations of Gage's verified complaints.

In the District Court Memorandum of Opinion which awarded attorneys fees to defendants, dated June 13, 1979, the District Court held that one of its reasons for awarding attorneys fees was that the statute of limitations had run. However, the District Court disregarded Gage's claims of a "continual conspiracy" and disregarded the allegation in the

verified complaint that the last overt act of defendants was in February, 1978.

C. The Course of the Ninth Circuit Proceeding

Gage's Appellant Brief presented the following issues for review:

> "A. The District Court erred by applying an improper standard in considering and weighing the evidence.
>
> 1. The District Court erred by refusing to comply with the preconditions for summary judgment:
>
> (i) summary judgment was granted when there were disputed material facts;
>
> (ii) summary judgment was granted even though there are conflicting inferences from the uncontested facts.
>
> 2. The District Court erred by construing all the facts in favor of appellees;
>
> 3. The District Court erred by deciding fact issues;
>
> 4. The District Court erred by allowing apellees to avoid their burden to establish the absence of genuine issues;

5. The District Court erred by deciding issues of intent and state of mind.

B. The Court erred in applying res judicata and/or collaterial estoppel to Gage's claim."

On January 22, 1981, Gage moved to strike appellees brief on the grounds that appellees confessed error by failing to provide the Court with any argument with regard to the issues presented on appeal. Apellees only argument was that the issues were "irrelevant."

Providing no explanation, on February 8, 1980, the Ninth Circuit denied Gage's motion to strike appellees' brief.

Stating that the majority of Gage's claims occurred in 1974 or before, and that the remaining claim fails to state a claim, the Ninth Circuit affirmed the dismissal of Gage's claims.

Gage's Petition for Rehearing claimed that:

> "1. The panel's April 22, 1981 Memorandum is irreconciably in conflict with the opinions of other panels of this Court in U.S. v. Inryco, Inc., 1981-1 Trade Cases ¶ 63, 952 (CA-9th, decided April 13, 1981 - Exhbit B attached); Solinger v. A&M Records, Inc., 586 F.2d 1304 (9th Cir. 1978); Gillibeau v. City of Richmond, 417 F.2d 426, 430 (9th Cir. 1969); Bollen v. De Bretteville, 239 F.2d 824, cert denied (1957) 353 U.S. 947, 88 S.Ct. 825, 1 L.Ed.2d 856.
>
> 2. This proceeding involves questions of exceptional importance in that the panel refused to apply Rule 56 standards to a civil rights case dismissed pursuant to Rule 12(b)(6) when matters outside the pleadings were presented and not excluded, and both the District Court and appellees agree that the District Court decided disputed issues of fact. In addition, the panel also made factual determinations by its findings that the majority of appellant's claims accrued in 1974 and selectively ignored additional claims of appellant that are within the statute of limitations.
>
> 3. The panel overlooked numerous claims alleged by appellant

including the claim that appellees continued to conspire to deprive appellant of his civil rights.

4. The panel overlooked every issue presented by appellant in his appeal herein."

D. The Allegations Contained in Gage's Verified Complaints

Because both the District Court and the Ninth Circuit did not address a majority of the claims, and because it is in conjunction with these claims that Gage contends a claim has been stated for relief, the following synopsis is from Gage's verified complaint and verified first amended complaint. The underlined portions are the allegations which the District Court and the Ninth Circuit have failed to address:

"2. Definitions

Project Area: for the purposes of this complaint, "Project Area" will refer to the Western Addition A-2 Redevelopment Project Area. The Project Area was designated a redevelopment project area

by the San Francisco Board of Supervisors on August 2, 1948. After federal funds became available through the Department of Housing and Urban Development (hereinafter "HUD"), in 1967 the San Francisco Redevelopment Agency (hereinafter "SFRA") began purchasing and demolishing many of the commercial properties in the Project Area.

Certificate of Preference: for the purposes of this complaint, Certificate of Preference refers to the requirement of the SFRA to give preference to Project Area residents, property owners, and businessmen in the purchase of property in the Project Area.

3. The Offenses Charged

Gage claims that appellees have conspired and continue to conspire intentionally and purposefully to deprive Gage of his right to property and to liberty without due process of the law and to the equal protection of the law.

In addition, Gage claims that appellees have conspired to deprive Gage and other blacks from seeking the equal protection of the laws and from enjoying equal rights, privileges and immunities of citizens and Gage's right not to be enslaved nor deprived of life and liberty other than by due

process of law as it relates to the relocating of black business from the Fillmore District of San Francisco.

Commencing at a date unknown to Gage, appellees engaegd, jointly and severally, in:

a. failing and refusing to comply with federal laws requiring permanent relocation of Gage's business from 1974 to the present;

b. violating federal laws and Gage's contract rights by evicting Gage from the Project Area in 1974;

c. violating federal and state laws by destroying Gage's business property, including Gage's automobiles and equipment in 1974;

d. violating federal and state laws by the conversion of Gage's business property in 1974 and in February, 1978;

e. violating federal and state laws prohibiting racial discrimination by discriminating against Gage because of his status as a black business tenant in the Project Area from 1974 to the present;

f. failing and refusing to return Gage's business records

which the SFRA has had in its possession and control since 1974;

g. violating the Agreement of Settlement and Dismissal, dated October 4, 1974, in B.P.I.A., et al. v. Lynn, et al., in the United States District Court for the Northern District of California, Civil No. C78 0534 CBR;

h. failing and refusing to allow Gage to purchase property in the Project Area pursuant to Gage's Certificate of Preference; and

i. depriving Gage of due process and of equal protection by misappropriating Gage's confidential and privileged documents in February, 1978.

4. Acts of Defendants

Appellee Board Members are empowered by California statute to administer and to enforce federal laws and the laws of the State of California relating to urban renewal.

Appellees Nord and Thomas are empowered by California laws to practice law in the State of California and are subject to the Rules of Professional Conduct, approved by the Supreme Court of the State of California.

From 1969 to July or August, 1972, Gage was a business tenant of the SFRA in the Project Area located at 1250 McAllister Street.

On or about June 5, 1972, Gage and the SFRA entered into a lease agreement providing, inter alia, that the SFRA would temporarily relocate Gage's business to 1040 McAllister Street in the Project Area until such time as the SFRA needed the property to build an elementary school. The SFRA agreed to complete numerous repairs to make the building located at 1040 McAllister Street habitable for Gage to conduct his business as an auto body repair shop. As consideration for the SFRA's promise to make the 1040 McAllister Street premises habitable for Gage's business, Gage promised to vacate the building which was located at 1250 McAllister Street upon completion of the repair work to be performed by the SFRA at the 1040 McAllister Street building.

Instead of completing the repairs on the building at 1040 McAllister Street, the SFRA evicted Gage from 1250 McAllister Street and moved Gage's business property to 1040 McAllister Street, thereby subjecting Gage's property to vandalism and to theft.

Despite numerous demands which were made by Gage to the SFRA and appellee Hamilton, the SFRA and appellee Hamilton failed and refused to complete the repairs and to make the 1040 McAllister Street premises habitable for Gage's business.

In April, 1973, appellee Thomas filed an unlawful detainer action against Gage, fraudulently alleging that Gage had agreed to pay $325/month rent for the 1040 McAllister Street premises and fraudulently alleging that Gage owed back rent totaling $3,058.00.

Through deceptive, illegal and fraudulent means, including but not limited to making knowingly false, capricious and misleading representations to the Municipal Court for the City and County of San Francisco, at a hearing in June, 1973, appellee Thomas obtained an order that Gage owed $1,000.00 in back rent. In addition, the Court ordered that SFRA make the numerous repairs that should have been performed in June, 1972, in order that Gage be able to conduct his business at 1040 McAllister Street.

Through deceptive, illegal and fraudulent means, appellee Thomas delayed submission of a proposed form of judgment to the Municipal Court of the City and County of San Francisco, which correctly

reflected the Court's ruling, until December, 1973, six months after the Court had ordered the repairs. The SFRA never complied with the June, 1972 contract and never complied with the Court order requiring repairs.

At or about the same time, in December, 1973, appellee Thomas, through deceptive, illegal and fraudulent means, commenced a third unlawful detainer proceeding against Gage by falsely claiming that plaintiff was served with a 30-day notice to vacate the 1040 McAllister Street building, even though the SFRA did not need the building in accordance with its plans to build an elementary school.

Through deceptive, illegal and fraudulent means, appellee Thomas obtained a default judgment against Gage in 1974 and evicted Gage from the building at 1040 McAllister Street, having never complied with the promises of the SFRA to make the building habitable for Gage's business and having never complied with the Court's order for repairs.

In furtherance of the conspiracy to deprive Gage of due process and equal protection of the laws, in 1974 appellee Thomas, through illegal and fraudulent means, illegally removed plaintiff's business records from the building

which was located at 1040 McAllister Street and retained possession and control of plaintiff's business records.

The SFRA, through the combined efforts of appellees, retained possession and control of Gage's documents in direct violation of a Court order which was dated April 21, 1976, and in direct violation of request for production of said documents.

In February, 1978, appellees, through illegal and fraudulent means, removed portions of Gage's property from storage, without Gage's consent or authorization. (CT 39-48, 49).

In furtherance of the conspiracy to deprive Gage of due process and of equal protection, appellees failed and refused to allow Gage to purchase property in the Project Area, pursuant to Gage's Certificate of Preference and pursuant to the Agreement of Settlement and Dismissal dated October 4, 1974 in B.P.I.A., et al. v. Lynn, et al., in the United States District Court for the Northern District of California, Civil No. C78 0534 CBR.

5. The Effects of Offenses

The intended and actual effects of the offenses were, have

been, and continue to be, that appellees have deprived Gage of his rights to property and to liberty without due process of law and to the equal protection of the laws, in violation of the Fourth, Fifth, Thirteenth and Fourteenth Amendments to the United States Constitution.

In addition, the intended and actual effects of the offenses were and have been that appellees have:

a. denied to black businessmen in the Project Area, and to Gage specifically, the benefits of federal and state laws for victims of urban renewal and the rights under the Certificate of Preference;

b. proximately damaged Gage in his business and property through, inter alia:

(1) destruction of Gage's business, good will, and other tangible assets of Gage;

(2) unlawful seizure of the assets of Gage in 1974 and 1978;

(3) unlawful interference with Gage's right to due process and to equal protection; and

> c. proximately damaged Gage by causing physical injury to Gage and emotional distress to Gage and Gage's family."

The basis for federal jurisdiction of Gage's claims is 28 U.S.C. § 1343.

V

ARGUMENT SUPPORTING ISSUANCE OF THE WRIT

A. To Require that National Television be a Necessary Prerequisite to File a Civil Rights Claim Would Cause a Chilling Effect on Civil Rights Actions

In disregarding substantial portions of the Gage verified complaint and verified first amended complaint, the District Court also disregarded the allegations which alleged the prima facie elements of a section 1983 action.

In Adickes v. S.H. Kress & Company (1970) 398 U.S. 144, the Supreme Court held that the terms of Section 1983 of Title 42 of the United States Code make

plain two elements that are necessary for recovery: the plaintiff must prove (1) that the defendant has deprived him of a right secured by the "Constitution and laws" of the United States, and (2) that the defendant deprived him of his constitutional right "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory." The Court went on to say that this second element requires that plaintiff show that the defendant acted "under color of law". All of these elements have been sufficiently alleged in Gage's verified complaint and verified first amended complaint.

By requiring that Gage secure national television coverage to establish a "strong" case, the District Court, in making factual determinations, held that Gage failed to state a claim, found that

Gage and his counsel filed the action in bad faith, and awarded attorneys fees against Gage and his counsel.

The Ninth Circuit was silent as to the above rulings of the District Court even though the rulings of the District Court were contrary to the purpose of Section 1983. Mithchum v. Foster (1972) 407 U.S. 225, Monroe v. Pape (1961) 365 U.S. 167, McNeese v. Board of Education (1963) 373 U.S. 668.

There is no precedent for the requirement of national television coverage. The chilling effect on the filing of civil rights actions is obvious. Only those persons with access to the media would be entitled to vindicate their civil rights. It also places the attorney for the civil rights litigant in the position of litigating in the media instead of the courts. Such a requirement

renders meaningless the express purpose of § 1 of the Civil Rights Act of 1871 (17 Stat. 13), from which 42 U.S.C. § 1983 is derived.

B. The Court Has No Discretion to Assume that the Acts of Defendants, in a Civil Rights Case, Were in Good Faith.

The District Court and the Ninth Circuit completely disregarded the standards concerning a Rule 12(b)(6) motion, which presents matters outside the pleadings. In Solinger v. A&M Records, Inc., 586 F.2d 1304, 1308 (9th Cir. 1978), the Court said that:

> "Under Fed.R.Civ.P. 12(b)(6), however, if there is a motion to dismiss for failure to state a claim upon which relief can be granted, and matters outside the pleadings are presented to and not excluded but are heard by the court, the motion is to be treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56, and particularly

56(c) thereof. Because material outside the pleadings was presented in this case, the judgment must be held to be one for summary judgment. Dorado v. Kerr, 454 F.2d 892, 896 (9th Cir. 1972).

"It is elementary that the district court before granting summary judgment must determine that no genuine issue of material fact exists, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c); Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976); Great Western Bank & Trust v. Kotz, 532 F.2d 1252, 1254 (9th Cir. 1976); Zweig v. Hearst Corp., 521 F.2d 1129, 1133 (9th Cir.) cert. denied, 423 U.S. 1025, 96 S.Ct. 469, 46 L.Ed.2d 399 (1975)." (Emphasis added.)

The Ninth Circuit decision in Gillibeau v. City of Richmond, 417 F.2d 426, 430 (9th Cir. 1969) said:

"... The rule that plaintiff's cause is not to be dismissed for failure to state a claim unless it appears without doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief applies to civil rights actions. York v. Story, 324 F.2d 450, 453 (9th Cir. 1963)." (Emphasis added.)

The Ninth Circuit disregarded the admissions of the District Court and disregarded the admissions of counsel for respondents that factual determinations had been made. There has never been a determination that no genuine issue of material fact exists. No opportunity was provided to Gage to make a more definite statement with respect to his allegations. The District Court made in excess of ten disputed factual determinations while the Ninth Circuit made numerous factual determinations concluding that the statute of limitations barred Gage's actions.

The mere fact that the District Court made a finding, based upon pre-existing knowledge, that defendants acted in good faith, is sufficient to defeat the District Court's summary judgment.

United States v. Diebold (1962) 369 U.S. 654, 655.

C. The Court Has No Discretion, in a Civil Rights Case, to Ignore Portions of Plaintiff's Allegations in Rendering a Rule 12(b)(6) Ruling

In reviewing a dismissal on the pleadings, the Court must take as true the material facts alleged in the complaint and the complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim. Hospital Building Company v. Rex Hospital Trustees (1976) 425 U.S. 738, 740. Conley v. Gibson (1957) 355 U.S. 41.

By ignoring substantial portions of Gage's claims, the District Court and the Ninth Circuit ruled on facts, which in

their discretion, they chose to consider. In a summary proceeding, the Court has no such discretion.

D. Allegations of Continual Conspiracy to Deprive Plaintiff of His Civil Rights Overcome the Statute of Limitations at the Pleading Stage

The Ninth Circuit's ruling is contrary to the holding in the Third Circuit in Bethel v. Jendoco Construction Corp. (CA 3d, 1978) 570 F.2d 1168 and Justice Holmes' decision in U.S. v. Kissel (1910) 218 U.S. 601 at 607-608.

> "But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous cooperation of the conspirators to keep it up, and there is such continuous cooperation, it is a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A

> conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan the conspiracy continues up to the time of abandonment or success."

VI
CONCLUSION

For the reasons advanced herein, the Court should grant a writ of certiorari to the Ninth Circuit Court of Appeal.

Dated: October 20,1981

Respectfully submitted,

James M. Dombroski
Attorney for Petitioner

(Appendices Follow)

APPENDIX A

UNITED STATES COURT OF APPEALS,

FOR THE NINTH CIRCUIT

THOMAS GAGE, Plaintiff-Appellant, vs. HOWARD M. WEXLER, et al., Defendants-Appellees.	NO. 79-4441

ORDER

Before: SNEED, FLETCHER, and NELSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no active judge of the court has requested a vote on the suggestion for rehearing

en banc. Fed. R. App. P. 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THOMAS GAGE, Plaintiff-Appellant, vs. HOWARD WEXLER, Board Member of the San Francisco Redevelopment Agency, et al., Defendants-Appellees.	NO. 79-4441 D.C. NO. C-78-0534 MEMORANDUM

Appeal from the United States
District Court for the
Northern District of California
Charles B. Renfrew,
District Judge, Presiding
Submitted March 12, 1981

Before: SNEED, FLETCHER and NELSON,
Circuit Judges

Appeal from dismissal of civil rights actions brought under 42 U.S.C. §§ 1981, 1982, 1983, and 1986.

The majority of appellant's claims

accrued in 1974 or before and thus are barred by the applicable statutes of limitations. 42 U.S.C. § 1986; 13 CAL. CIV. PROC. CODE § 338; see Clark v. Musick, 623 F.2d 89, 92 (9th Cir. 1980).

Appellant's remaining claim, that appellees disobeyed a state court order, does not of itself create a basis for an inference that appellant's civil rights were violated. See Sarelas v. Porikos, 320 F.2d 827, 929 (7th Cir.), cert. denied, 375 U.S. 985 (1963). As appellant in this remaining claim does not otherwise make an adequate showing of the essential elements of a civil rights action, he fails to state a claim under the Civil Rights Acts. Williams v. Gorton, 529 F.2d 668, 670 (9th Cir. 1976); Davenport v. Berman, 420 F.2d 294, 296 (2d Cir. 1969).

AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS GAGE, Plaintiff, vs. HOWARD WEXLER, et al., Defendants.	NO. C-78-0534-CBR

JUDGMENT

The Court having considered the pleadings on file in this action and heard the arguments of counsel, the Court hereby enters judgment in favor of defendants Howard M. Wexler, Joan-Marie Shelley, Dian Bloomquist, Rubin Glickman, Walter F. Kaplan, Melvin D. Lee, Hannibal A.

Williams, Wilbur Hamilton, Steven Nord, Richard Thomas and The San Francisco Redevelopment Agency, and each of them, against plaintiff Thomas Gage and against his attorney of record James M. Dombroski as hereinafter set forth.

By Memorandum of Opinion filed on December 8, 1978, the Court granted defendants' Motion to Dismiss Plaintiff's First Amended Complaint for failure to state a claim on which relief could be granted. The Court also ordered that the First Amended Complaint and the action herein be dismissed with prejudice.

By Memorandum of Opinion filed on June 14, 1979, the Court further ordered that the above-named defendants, jointly and severally, be awarded two thousand dollars ($2,000) as attorneys' fees and that such award run against plaintiff Thomas Gage and his attorney of record James M. Dombroski, and each of them. The

Court also ordered that defendants, and each of them, may have their additional costs taxed against plaintiff Thomas Gage.

Now, with good cause appearing therefor, the Court hereby enters judgment as follows:

1. The First Amended Complaint and the action herein are dismissed with prejudice.

2. Defendants Howard M. Wexler, Joan-Marie Shelley, Dian Bloomquist, Rubin Glickman, Walter F. Kaplan, Melvin D. Lee, Hannibal A. Williams, Wilbur Hamilton, Steven Nord, Richard Thomas and The San Francisco Redevelopment Agency, jointly and severally, shall have judgment against plaintiff Thomas Gage and his attorney James M. Dombroski, and each of them, in the sum of two thousand dollars ($2,000).

Dated: June 21, 1979

CHARLES B. RENFREW
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS GAGE, Plaintiff, vs. HOWARD WEXLER, et al., Defendants.	NO. C-78-0534-CBR

MEMORANDUM OF OPINION

On December 8, 1978, this Court granted defendants' motion to dismiss plaintiff's First Amended Complaint for failure to state a claim, and the First Amended Complaint and the action therein were dismissed with prejudice. At the same time, a hearing was set for the purpose of determining whether under all of the circumstances it would be appropri-

ate to award defendants their attorney's fees. Such a hearing was held on March 15, 1979. After considering the oral argument of the parties and the post-hearing memorandum and letters submitted herein, this Court finds that an award of fees to defendants is appropriate.

Plaintiff's federal claims were based upon 42 U.S.C. §§1981, 1982, 1983, 1985(2), (3), and 1986. Statutory provision for awarding attorney's fees for such claims is found at §1988:

> "In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." (As amended, Pub.L. No. 94-559, §2, Oct. 19, 1976, 90 Stat 2641.)

The standard for assessing the propriety of awards to defendants is provided in Christianburg Garment Co. v. EEOC,

434 U.S. 412, 421, 422 (1978), which dealt with the analogous fees provision[1] for Title VII litigation:

> "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421.
>
> "[A] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so. And, needless to say, if a plaintiff is found to have brought or continued such a claim in bad faith, there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." 434 U.S. at 422 (emphasis in original).

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[1] Section 706(k) of Title VII of the Civil Rights Act of 1964 provides in relevant part, "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs* * *." 42 U.S.C. §2000e-5(k).

Equity also authorizes the federal courts to award attorney's fees, as "federal courts, in the exercise of their equitable powers, may award attorney's fees when the interests of justice so require." Hall v. Cole, 412 U.S. 1, 4-5 (1973). Thus, as the Court pointed out in Hall, "it is unquestioned that a federal court may award counsel fees to a successful party when his opponent has acted 'in bad faith, vexatiously, wantonly, or for oppressive reasons.'" 412 U.S. at 5. In this case, both standards were met. This Court finds that plaintiff's claims were groundless and in addition litigated in bad faith. Accordingly, an award of attorney's fees is justified in both law and equity.

The groundlessness of plaintiff's suit is best demonstrated in the facts set forth in the Memorandum of Opinion dismissing his complaint for failure to

state a claim. Plaintiff operated an auto body shop for five years as a tenant of the San Francisco Redevelopment Agency ("Redevelopment Agency"). Angered by incidents pertaining to the relocation of his shop, he has been an unsuccessful party to four lawsuits with the Redevelopment Agency in state courts.[2] He claims that the Redevelopment Agency is responsible for the eventual loss of his business and subsequent physical and emotional problems. This lawsuit, the fifth in the

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[2] Agency v. Gage, No. 643316 (Sup.Ct.1972) (eviction from Redevelopment Agency property located at 1250 McAllister Street); Agency v. Gage, No. 688-988 (Sup.Ct.1973) (eviction from Redevelopment Agency property located at 1040 McAllister Street and for back rent); Agency v. Gage, No. 699-131 (Sup.Ct. 1974) (eviction from 1040 McAllister Street); Gage v. Agency, No. 661-094 (Sup.Ct. 1978) (suit for breach of contract, negligence for failure to repair the premises at 1250 McAllister Street, negligence in moving plaintiff's property from 1250 McAllister Street to 1040 McAllister Street, and interference with business opportunities between January, 1970 and June 1, 1973).

series, was filed in this Court on the last business day before retrial of the fourth suit was scheduled to begin in state court and sought $15 million in actual and punitive damages from several members of the Redevelopment Agency and its employees. At a June 1, 1978, status conference, this Court twice warned plaintiff that if this suit were no more than a collateral attack on a state judgment, the suit would be seen as an abuse of process and that attorney's fees may be awarded to defendants.[3]

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[3] This Court warned plaintiff as follows:

> "* * * I think that you should think through very carefully your claim here because if it really doesn't have any substance and if you are really seeking a collateral attack on a state court judgment, you are just trying to relitigate the same issues in this case, you may be liable for the attorneys' fees for the parties that have been sued here because this couldn't be said to be made in good faith.
>
> "This would be an abuse of

Plaintiff then filed a First Amended Complaint not substantially different from the original complaint. This Court found the amended complaint to be a mere restatement of the earlier state claims, showing "the absence of any meritorious civil rights claim." The Court noted that "[b]y broadly alleging that defendants have pursued these and other actions as part of a continuing conspiracy to interfer with plaintiff's civil rights, plaintiff hopes to breathe new life into his stale state claims." Memorandum of

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process and an abuse of litigation, so I think it should be thought through very carefully." (June 1, 1978 Transcript, pp. 7-8.) "* * * I do just add this caution, because if I find that there isn't a good faith basis for proceeding under the Civil Rights Act here and that this is simply a collateral attack on a state court judgment, it may cost your client some money and you some money." (June 1, 1978 Transcript, pp. 9-10.)

Opinion filed December 8, 1978, at p. 5. In dismissing, this Court held that the Civil Rights Act cannot be used to obtain review of state court judgments, and that the claims of due process and equal protection violations, phrased in conclusory terms and lacking factual allegations, were inadequate to state a claim for relief under the Civil Rights Act. Additionally, plaintiff's pendent state claims were dismissed as they longer attached to valid federal claims.

Although the groundlessness of plaintiff's claims alone would justify an award of fees to defendants, Christiansburg Garment Co. v EEOC, supra, plaintiff's bad faith in bringing and maintaining this suit deserves comment as well. The federal claims were all facially deficient, failing to properly allege invidious

discrimination[4] or deprivation of constitutional rights.[5] Further, all of the federal claims were barred by the statute of limitations as the incidents complained of in this suit, which was filed in 1978,

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[4] The statutes relied on by plaintiff (except §1983) require as an element of the cause of action that there be some racial, or perhaps otherwise class-based, "invidiously discriminatory animus behind the conspirators' action." They do not cover all tortious interferences with the rights of others. Griffin v. Breckenridge, 403 U.S. 88, 101-102 (1971). Plaintiff alleges no more than the fact that he is black, and thus fails to state a claim under the statutes cited.

[5] Sections 1983 and 1985 require that plaintiff allege a deprivation of constitutional rights; his vague references to due process and equal protection do not meet this requirement. "It is well settled that conclusionary allegations, unsupported by any underlying factual details, are insufficient to state a claim under the Civil Rights Act." Reese v. Nixon, 346 F.Supp. 314, 316 (C.D.Cal. 1972).

occurred between 1972 and 1974, and the longest applicable statute of limitations is three years.[6] Apprised of these facts by defendants, plaintiff insisted on continuing the litigation. Additionally, the timing of this suit and the attempted implication of opposing counsel bespeak a vexatious motive. After unsuccessfully moving to have defendants' attorneys disqualified from the fourth state suit, plaintiff filed this suit on the literal

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[6] Of the federal statutes relied upon by plaintiff, only §1986 has an explicit statute of limitations, and it bars actions not commenced within one year after the cause of action has accrued. For those claims based on other sections of the Civil Rights Act, this Court applied the analogous state statute of limitations, consistent with federal policies. De Malherbe v. Intern. U. of Elevator Constructors, 449 F.Supp. 1335, 1350-1351 (N.D.Cal. 1978). The analogous statute here, for claims based on liability created by statute, is California Code of Civil Procedure §338(1), which provides a three-year limitation for "an action upon a liability created by statute, other than a penalty or a forfeiture."

eve of the retrial of the state suit, naming the defendants' attorneys as defendants and seeking fifteen million dollars in damages. Plaintiff then lost the retrial in the state court. Defendants filed a certificate of counsel in the instant case and put plaintiff on notice that future motions were anticipated with respect to counsel being continued in this case. Thereafter, plaintiff dropped the attorneys as defendants and reduced the prayer to two million dollars. These actions suggest that the federal action was brought merely for its in terrorem effect during the state litigation. The substantial change in the prayer sought, as well as the frivolity of the claim, demonstrates a failure to comply with Rule 11 of the Federal Rules of Civil Procedure.[7]

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[7] Rule 11 of the Federal Rules of Civil

Procedure provides:

> "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated. A party who is not represented by an attorney shall sign his pleading and state his address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

Thus, there is ample justification for awarding attorney's fees to defendants. The award could cover a reasonable fee in it entirety, following the guidelines set forth in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5 Cir. 1974), to determine the reasonableness of the fee. Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69 (9 Cir. 1975), cert. denied, 412 U.S. 951 (1976).

This Court is mindful of the possibly chilling effect an award of attorney's fees to a prevailing defendant may have upon other potential plaintiffs seeking to vindicate their civil rights. The Civil Rights Acts are a part of the moral bedrock of our nation. They reflect the value we place upon the individual and implement the deep and long-felt concern that all persons be accorded equal treatment under the law. Congress has long been aware that our entire society suffers

if just one person is subjected to unlawful treatment because of race, sex, national origin or the like. It is because of the invaluable cathartic role of civil rights cases that the courts must be vigilant against their abuse. One may not use the civil rights statutes as a means of obtaining federal court review over state court actions. Nor may one with knowledge of the baselessness of his claim bring a civil rights action seeking many millions of dollars of damages as an in terrorem bargaining tool.

The prevailing defendants have incurred substantial expenses for attorney's fees to date. However, an award of a portion of these expenses seems to be sufficient in light of all of the circumstances, including plaintiff's limited financial resources. Accordingly, an award of $2,000 for attorney's fees will be made to defendants. Both

plaintiff and his counsel are culpable. They each knew or should have known that the allegations were not susceptible of proof in a court of law. Counsel, moreover, was under a professional obligation not to bring such a frivolous suit. Therefore, the costs of attorney's fees will be taxed against plaintiff and his counsel, James W. Dombroski. Robert Nemeroff, D.D.S. v. Alan Abelson, et al., (Case No. 77 Civ. 1472 (RLC) S.D.N.Y.), Opinion filed April 19, 1979. In addition, defendants are to recover their costs as taxed against plaintiff.

IT IS HEREBY ORDERED that defendants are awarded two thousand dollars ($2,000) as attorney's fees together with their costs.

IT IS HEREBY FURTHER ORDERED that counsel for defendants shall prepare an appropriate form of judgment in accordance

with this Memorandum of Opinion and the earlier Memorandum of Opinion dismissing this case with prejudice and submit it to the Court for execution within ten (10) days hereof.

Dated: June 13, 1979

CHARLES B. RENFREW
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

THOMAS GAGE, Plaintiff, vs. HOWARD WEXLER, Board Member of the San Francisco Redevelopment Agency, et al., Defendants.	NO. C-78-0534-CBR

MEMORANDUM OF OPINION

This is an action brought under the Civil Rights Act, 42 U.S.C. §§1981, 1982, 1983, 1985(2) and (3), and 1986, with pendent claims of conversion, abuse of process, misappropriation of trade secrets, and interference with economic advantage. Plaintiff, Thomas Gage, is a black businessman and former tenant of defendant

Redevelopment Agency of San Francisco ("Agency"). He has been previously involved as a party in four lawsuits with the Agency in state court.[1] Defendants include the Agency, seven present members of the Board of Directors of the Agency, the Executive Director of the Agency, and two attorneys hired as in-house counsel to represent the Agency in the state court suit, Gage v. Agency, No. 661-094. This action is before the Court on defendants' motion to dismiss the First

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[1] Agency v. Gage, No. 643316 (Sup.Ct.1972) (eviction from Agency property located at 1250 McAllister Street); Agency v. Gage, No. 688-988 (Sup.Ct. 1973)(eviction from Agency property located at 1040 McAllister Street and for back rent); Agency v. Gage, No. 699-131 (Sup.Ct. 1974)(eviction from 1040 McAllister Street); Gage v. Agency, No. 661-094 (Sup.Ct. 1978)(suit for breach of contract, negligence for failure to repair the premises at 1250 McAllister Street, negligence in moving plaintiff's property from 1250 McAllister Street to 1040 McAllister Street, and interference with business opportunities between January, 1970 and June 1, 1973).

Amended Complaint, and related motions. After carefully considering the contentions raised in plaintiff's complaint and the First Amended Complaint, the Court concludes that defendants' motion to dismiss must be granted.

HISTORY

From 1969 to 1974 plaintiff operated an auto body repair ship as a business tenant of the Agency. His business was not a success, and his relationship with the Agency became strained. As a consequence, he has been a party to four lawsuits with the Agency in state court.

The last of those lawsuits, Gage v. Agency, No. 661-094, was initiated in California Superior Court for the City and County of San Francisco by the plaintiff in 1973. Therein plaintiff sought to recover actual and punitive damages in excess of a million dollars for various activities of the Agency which allegedly

resulted in the destruction of plaintiff's business. The case was tried in 1976, but the jury hung 8-4 in favor of the defense. The case was set for retrial in March, 1978.

The original complaint in this action was filed on March 11, 1978, the last business day before retrial in state court was scheduled to begin. That federal complaint contained allegations very similar to those contained in the state case, and added the claim that plaintiff's civil rights had been violated as a result of a continuing conspiracy by defendants. It prayed for $15 million in actual and punitive damages.

During the initial status conference, this Court admonished counsel for plaintiff:

> "I think that we have to be careful that we don't seek to use a civil rights claim as a method of obtaining a review of the state court action. I

> don't intend to do that and I think that you should think through very carefully your claim here because if it really doesn't have any substance and if you are really seeking a collateral attack on a state court judgment, you are just trying to relitigate the same issues in this case, you may be liable for the attorneys fees for the parties that have been sued here because this couldn't be said to be made in good faith.
>
> "This would be an abuse of process and an abuse of litigation, so I think that it should be thought through very carefully." Transcript of June 1, 1978 Status Conference at 7, line 21, through 8, line 5.

Despite this unambiguous warning, plaintiff submitted a First Amended Complaint not significantly different from the original complaint. Included therein were renewed claims of violations of plaintiff's civil rights, allegedly resulting from defendants' continuing conspiracy to do injury to plaintiff and his business.

The factual allegations contained in the original and amended complaints have,

in almost all material respects, been resolved or addressed in the earlier states cases. For example, the First Amended Complaint alleges (1) defendants' failure to relocate permanently plaintiff's business in accordance with federal laws (¶15a); (2) defendants' illegal eviction of plaintiff from 1040 McAllister Street by means of fraudulent unlawful detainer suits (¶15b, 22-26); (3) defendants' destruction and conversion of plaintiff's business property (¶15d, 70); and (4) defendants' theft of plaintiff's business records (¶15f, i, 27-29, 32b, 70, 81, 83).

The first noted allegation was clearly addressed in plaintiff's earlier suit against the Agency, and so indicated by plaintiff's opening statement in that case:

> "So basically the contract concerns two promises. One was the promise that if

Mr. Gage agreed to vacate the 1250 McAllister address, which he did, they would make the repairs necessary for him to conduct his business at 1040 McAllister Street. The second concerns their promise to permanently relocate Mr. Gage in the event that they needed that building in accordance with the Redevelopment Plan. So those are the two primary issues."[2] Transcript of March 15, 1978, in Gage v. Agency, No. 661-094, at p. 5 (emphasis added).

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[2] Plaintiff asserts that the state case related only to breach of contract claims whereas the present case is based on failure to comply with federal regulations concerning relocation. He is mistaken. In his opening statement, counsel for plaintiff referred to and relied upon the Agency's relocation duties under the Department of Housing and Urban Development Guidelines (which were later introduced as Trial Exhibits 20-26 in the form of the HUD Relocation Handbook):

> "In the process of relocating them, they have certain duties and responsibilities with respect to the residents that are relocated and with respect to the businesses that are relocated. We are going to be dealing with the responsibilities that the Redevelopment Agency has with respect to the businesses and not the residents.
>
> * * * * *
>
> "Now, with respect to the nature

The fraudulent unlawful detainer allegations were also the subject of the earlier litigation as indicated by plaintiff's Fourth Cause of Action therein:

> "6. In May, 1973, despite its deliberate failure to comply with the June 5, 1972 agreement, Defendant AGENCY filed a spurious unlawful detainer action against Plaintiff seeking to evict him from the 1040 McAllister Street premises. In said complaint, Defendant AGENCY intentionally misrepresented its leasehold arrangement with Plaintiff alleging that it had an oral agreement beginning August 1, 1972, and completely failing to mention

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of the claims, the nature of the claims primarily centers around two issues. The first issue concerns Mr. Gage's SBA loan opportunities. Mr. Gage, because he is a business tenant in a blighted area and because the Redevelopment Agency has a duty to relocate them, has certain rights under the HUD guidelines to what are called displacement loans. And the Redevelopment Agency has a duty, an affirmative duty, to assist and aid him in applying for an SBA loan." Transcript of March 15, 1978, in Gage v. Agency, supra, at pp. 3-4.

> the written leasehold agreement, signed June 5, 1972." Complaint in Gage v. Agency, No. 661-094 at p. 6, ¶6 (emphasis added).

This claim was abandoned at trial and dismissed with prejudice.

Destruction of plaintiff's automobiles and conversion of his property were also alleged in plaintiff's state court claims, see Complaint, Gage v. Agency, No. 661-094, at p. 3, ¶¶2-4, and p. 4, ¶¶2-5, where they also were abandoned and dismissed with prejudice. See Transcript of March 15, 1978, in Gage v. Agency, No. 661-094, at pp. 13-15.

Finally, the allegation that defendants stole plaintiff's business records was also involved in the state suit. This charge was made in conjunction with plaintiff's unsuccessful motion before Superior Court Commissioner Manley to have defendants' attorney disqualified. It was resurrected and rejected three more times

at trial before Judge Ertola. See Transcript of March 30, 1978, in Gage v. Agency, supra, at pp. 1-3.

CIVIL RIGHTS ACTION

Although these listed allegations do not exhaust all the claims made in plaintiff's First Amended Complaint, they do evidence plaintiff's conspicuous strategy in commencing this action in federal court. By broadly alleging that defendants have pursued these and other actions as part of a continuing conspiracy to interfer with plaintiff's civil rights, plaintiff hopes to breathe new life into his stale state law claims. The Court could address each individual claim and allegation asserted by plaintiff, and indicate the obvious relationship between them and the state court litigation, and the absence of any meritorious civil rights claim. However, such an exercise would consume only more of the Court's valuable time, and

require greater attention than is necessary to dispose of this case. Furthermore, defendants' memorandum and reply memorandum in support of their motion more than adequately details the transparent attempt of plaintiff to secure federal review of his claims. Consequently, it is enough to say at this point that plaintiff's suit is no more than a vaguely disguised attempt to raise his claims under the cover of a civil rights action.

In his First Amended Complaint plaintiff merely restates his earlier state court claims and envelops them in general, conclusionary allegations under the heading of "Offenses Charged." Therein he states:

> "13. Defendants and co-conspirators have considered and continue to conspire intentionally and purposefully to deprive plaintiff of his right to property and to liberty without due process of the law and to the equal protection of the law.

> "14. Defendants and co-conspirators have conspired to deprive plaintiff and other blacks from seeking the equal protection of the laws and from enjoying equal rights, privileges and immunities of citizens and plaintiff's right not to be enslaved nor deprived of life and liberty other than by due process of law." First Amended Complaint, at p. 4.

In effect, plaintiff presumes that because he is black, his conclusionary allegations relating to discrimination and deprivation of constitutional rights somehow suffice to state a civil rights claim. But "the mere fact that plaintiffs are black does not automatically entitle them to claim that anything that happened to them has happened because they are black." Phillips v. Fisher, 445 F.Supp. 552, 556 (D.Kan. 1977) (emphasis in original). The fact that plaintiff is black does "not magically transform state court litigation into the subject of a federal civil rights action, merely by

alleging the fact of his race." Id. at 557. "Conclusionary allegations, unsupported by any underlying factual details, are insufficient to state a claim under the Civil Rights Act. [Footnote omitted.]" Reese v. Nixon, 347 F.Supp. 314, 316 (C.D.Cal. 1972); Accord Finley v. Rittenhouse, 416 F.2d 1186, 1187 (9 Cir. 1969).

Factual allegations are noticeably absent in plaintiff's papers. Nowhere does he provide any support to show "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action. [Footnote omitted.]" Griffin et al. v. Breckenridge et al., 403 U.S. 88, 102 (1971).

The Civil Rights Acts cannot be used as they are here to "vindicate solely state law claims by peppering [the] allegations with frequent, vague references to due process and equal protection." Sykes v. State of California, 497 F.2d 197,

202 (9 Cir. 1974). Nor can the Civil Rights Act be used to obtain review of state court judgments, see Myer v. Lavelle, 389 F.Supp. 972, 975 (E.D.Pa. 1975), as made clear by the ruling in Phillips v. Fisher, supra, 445 F.Supp. 552, a case strikingly similar to the present case.

In Phillips the court dismissed a complaint filed by an interracial couple against a moving company and its attorneys. The dispute, which arose over the loss of plaintiff's belongings during their move from California to Kansas, had already led to three state court suits. While those state actions were pending, the federal action, brought under 42 U.S.C. §§1981, 1985 and 1986, was initiated. Therein, plaintiffs reasserted the claim that the moving company had lost their property. In addition, they claimed that because they were an interracial couple, defendants and their attorneys had

conspired to prevail in state court by committing perjury, falsifying evidence, and threatening witnesses.

After determining that plaintiffs could not conceal the true nature of their claims simply by recasting them in a civil rights action, the court granted the motion to dismiss. In remarks particularly appropriate to this action, the court there said:

> "What this case boils down to is the question of whether a complaint, which states facts from which no inference of racial discrimination can reasonably be drawn * * * may be said to adequately state a cause of action under §§1981, 1985(2), and 1985(3) merely by the addition of a conclusory allegation [of racial prejudice] such as is contained in paragraph #2 of plaintiffs' complaint. This Court has recently been faced with this precise question in two other actions filed by the law firm representing plaintiffs in this action. We have answered the question in the negative.
>
> * * * * *
>
> In both Gastion and Steele, as here, plaintiffs were apparently

> dissatisfied with either the outcome or the progression of state court litigation. In both cases, as here, the specific factual allegations contained in the complaint contained no hint of racial motivation underlying the defendants' actions. In both cases, as here, plaintiffs attempted to obtain federal court jurisdiction by making totally conclusory allegations of racial discrimination. * * * [W]e addressed the question of whether in the context of factual allegations which contained no indication of racial discrimination, a blanket averment of such discrimination is sufficient to state a civil rights cause of action. * * * As we said in Gastion v. Scott, * * *:
>
> "'* * *[Where] [n]othing appears in plaintiffs' factual allegations which would support any inference of racial discrimination other than the mere fact that plaintiffs are black [no claim under the Civil Rights Act exists].'" 445 F.Supp. at 555-556.

Plaintiff here has done no more than plaintiffs in Phillips. He states that he is a black businessman and proceeds from there to conclude that his problems with the Agency resulted from a conspiracy

to deprive him of his civil rights.[3]

As such:

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[3] "We do not say today that a plaintiff who seeks relief from alleged racial discrimination must reallege facts which inescapably lead to the finding of a race-based animus on the part of a defendant. There are situations where the facts alleged themselves lead to a reasonable inference that the motive behind a defendant's actions may have been race. For example, if a black man is refused service in a restaurant, an allegation that the cause thereof was racial prejudice squares with the common experience of men in everyday life, and the causative inference is a logical one to draw. On the opposite side of the continuum is the situation where the wrong committed is not of a sort which is likely to be motivated by race. If a black man is arrested fleeing the scene of a bank robbery it does not comport with the common experience of men to infer that the motive or cause for his arrest is his race; other apparent motives on the part of the actor so predominate as to make inferences of racial discrimination laughable. The Court cannot shut its eyes to the world beyond the bench." Phillips v. Fisher, 445 F.Supp. 552, 556-557 (D.Kan. 1977).

> "This action * * * is a typical example of the kind of action being filed with increasing frequency under the provisions of the Civil Rights Act of 1871, §§1981-1986. Having been defeated in state court proceedings and being unhappy and somewhat humiliated and frustrated by the results of such proceedings, these persons lash out * * * in a last desperate effort to re-litigate the issues on which they once lost and hoping to secure sizeable damages to boot." Shakespeare v. Wilson, 40 F.R.D. 500, 502 (S.D. Cal. 1966).

Plaintiff's due process and equal protection allegations are inadequate. It is well settled that general allegations of conspiracy, phrased in conclusory terms, are not sufficient to state a claim for relief under the Civil Rights Act. See, e.g., Harley v. Oliver, 539 F.2d 1143, 1146 (8 Cir. 1976); Williams v. Gorton, 529 F.2d 668, 671 (9 Cir. 1976); Finley v. Rittenhouse, 416 F.2d 1186, 1187 (9 Cir. 1969). Accordingly, plaintiff's civil rights claims cannot survive defendants' motion to dismiss.

Additionally, plaintiff's pendent state claims are dismissed as they no longer attach to valid federal claims.

> "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right. * * * Certainly, if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." United Mine Workers of America v. Gibbs, 383 U.S. 715, 726 (1966) (footnotes omitted).

ATTORNEY'S FEES

Defendants have urged the Court to require plaintiff to pay their attorney's fees because of what they characterize as plaintiff's bad faith in pursuing this litigation despite its obvious relationship to the previously adjudicated state court suits. In particular they note the Court's early admonishment of the plaintiff, see p. 3, supra, placing him on notice that attorney's fees may be available to defendants if the litigation is in fact only a collateral attack on the state

court judgments.

In light of the seriousness of this allegation, and plaintiff's failure to respond to it in his papers, this Court believes that a hearing on the issue of attorney's fees is appropriate. In seeking a more thorough review of this question, the Court is guided by the recent pronouncements of the Supreme Court in Christianburg Garment Co. v. E.E.O.C., 434 U.S. 412 (Jan. 23, 1978), on the question of attorney's fees in Title VII litigation. Therein the Court held that

> "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> * * * * *
>
> "* * * Hence, a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it

clearly became so." 434 U.S. at 421-422.

Whether plaintiff's action in initiating and pursuing this litigation constituted such conduct is a question that needs further discussion.

Accordingly, IT IS HEREBY ORDERED that defendants' motion to dismiss plaintiff's First Amended Complaint for failure to state a claim is granted, and that the First Amended Complaint and the action therein are dismissed with prejudice.

IT IS HEREBY FURTHER ORDERED that counsel for plaintiff and defendants appear before this Court for a hearing on the matter of attorney's fees on Thursday, January 11, 1979 at 9 A.M.

IT IS HEREBY FURTHER ORDERED that defendants file any additional memoranda on the subject of attorney's fees by December 19, 1978, and plaintiff file its

response by January 2, 1979. Defendants may file a response thereto by January 8, 1979.

Dated December 7, 1978

CHARLES B. RENFREW
United States District Judge

Appendix F

42 U.S.C. § 1981

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1982

All citizens of the United States shall have the same right, in every State and Territory, as enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property.

42 U.S.C. § 1983

Every person who, under color of any

statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985(2), (3)

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testifies, or to influence

the verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such jurur; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either

directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving securities to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support of advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act

in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986

Every person, who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have

prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accured.

Rule 12(b), Federal Rules of Civil Procedure

(b) HOW PRESENTED, Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counter-claim, cross-claim, or third-party claim, shall be asserted in the responsive pleading

thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficienty of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion, asserting the defense numbered (6) to dismiss

for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c), Federal Rules of Civil Procedure

(c) MOTION AND PROCEEDINGS THEREON, The motion shall be served at lease 10 days before time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco--ss.

James M. Dombroski, being first duly sworn says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; I am a member of the Bar of the Superior Court of the United States; that affiant's business address is 235 Montgomery Street, Suite 425, San Francisco, California 94104; that affiant served the required number of copies of the attached Petition For A Writ Of Certiorari, "Thomas Gage vs. Howard Wexler, Board Member of the San Francisco Redevelopment Agency, et al.," No. A-288

on each of the following by placing same in an envelope addressed (respectively) as follows:

Joel Zeldin, Esq.
One Embarcadero, Suite 2701
San Francisco, California 94111

that each of said envelopes was then, on October 20, 1981, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed, and that said mailing took place within the permitted time for filing.

ARTHUR L. MARTIN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires September 11, 1982

JAMES M. DOMBROSKI

Subscribed and sworn to before me this 20th day of October, 1981

Arthur L. Martin

Notary Public in and for the City and County of San Francisco, State of California

ARTHUR L. MARTIN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires September 11, 1982

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on each of the following by placing an original and forty (40) copies in an envelope addressed (respectively) as follows:

Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

that each of said envelopes was then, on October 20, 1981, sealed and deposited in the United States mail at San Francisco, California, with the first-class postage thereon fully prepaid; and that there is delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed, and that said mailing took place within the permitted time for filing.

JAMES M. DOMBROSKI

Subscribed and sworn to before me
this 20th day of October, 1981.

Arthur L. Martin

Notary Public in and for the City and County
of San Francisco, State of California

ARTHUR L. MARTIN
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires September 11, 1982

Opposition

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No. 81-767

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1981

Thomas Gage,

Petitioner,

vs.

Howard M. Wexler, Board Member of San Francisco Redevelopment Agency, et al.

Respondents.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the District Court and Court of Appeals correctly held that petitioner's claims are barred by the applicable statutes of limitations?

2. Whether the District Court and Court of Appeals correctly held that petitioner stated a valid claim for relief under the Civil Rights Acts?

3. Whether the District Court properly dismissed the action and whether sanctions were properly imposed upon petitioner and his counsel under Rule 11 for initiating and pursuing this litigation in bad faith?

PARTIES TO THIS PETITION

The petitioner herein is Thomas Gage. It is unclear whether petitioner's counsel, James M. Dombroski, is joining in this petition. Both petitioner and his counsel

were assessed $2,000.00 in attorneys' fees as a sanction for bringing and maintaining this lawsuit in bad faith.

Respondents are the Redevelopment Agency of the City and County of San Francisco (a public agency); Howard M. Wexler, Joan-Marie Shelley, Dian Blomquist, Rubin Glickman, Walter F. Kaplan, Melvin D. Lee, and Hannibal A. Williams (Commissioners of the Redevelopment Agency); Wilbur Hamilton (Executor Director of the Redevelopment Agency); and Steven Nord and Richard Thomas (former in-house lawyers for the Redevelopment Agency).

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No. 81-767

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1981

Thomas Gage,

Petitioner,

vs.

Howard M. Wexler, Board
Member of San Francisco
Redevelopment Agency, et al.

Respondents.

OPPOSITION TO PETITION FOR A WRIT
OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner and plaintiff Thomas Gage seeks a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which judgment affirmed the United States District Court's judgment dismissing the action and

awarding $2,000.00 in attorneys' fees against petitioner and his counsel. Respondents oppose this petition for certiorari on the dual grounds that (a) the District Court and the Court of Appeals correctly disposed of this matter, and (b) this case does not present issues appropriate for consideration by this Court under Rule 17 of the Supreme Court Rules.

STATEMENT OF THE CASE

Unfortunately, petitioner's Statement of the Case tells the Court little about the actual proceedings below or the issues to be decided on this appeal. It is therefore necessary for respondents to detail the proceedings below so that this Court may understand the context in which Judge Renfrew dismissed petitioner's suit and the Court of Appeals affirmed dismissal. As will become apparent, petitioner has pursued this litigation in an attempt to

secure federal review of an adverse state court judgment.

Petitioner filed his original Complaint in this action on March 9, 1978 (i.e., the Thursday before re-trial of the related state court action between the same parties was to commence). Petitioner's Complaint explained the basis of his federal action as follows:

> "Plaintiff was a business tenant of SFRA [the Agency] with his principal place of business located within the Project Area. Plaintiff was doing business as Gage Body and Frame Shop until he was forced out of business by the SFRA. In June, 1973, plaintiff filed an action entitled Gage v. SFRA in the superior court of the City and County of San Francisco, civil number 661-094, for inter alia, breach of contract (hereinafter Gage v. SFRA). In June, 1976, a 3-week jury trial in Gage v. SFRA resulted in a mistrial in that the jury was unable to reach a majority verdict because plaintiff did not have his business records which the SFRA retained in its possession and control since 1974. Thereafter, the SFRA in Gage v. SFRA opposed two motions to advance the trial date made by plaintiff

> and successfully continued the trial date on two separate occasions. Then, on February 24, 1978, two days before the case was set to go on trial, the SFRA through defendants and co-conspirators, produced a portion of plaintiff's business records that had been illegally withheld from plaintiff."

Thus, from the outset, petitioner's stated purpose in bringing his federal action was to relitigate matters raised or related to the state court suit. Petitioner even attached a copy of the state court Complaint as an exhibit to his original federal court Complaint. As is detailed in Judge Renfrew's Memorandum of Opinion (petitioner's Appendix E), the federal Complaint virtually tracked the state court Complaint in alleging a myriad of illegal conduct undertaken by the Agency between 1972 and 1974. Also, the original Complaint in the federal action attacked respondents' allegedly unfair defense of the state court action.

Based upon the foregoing, petitioner claimed that respondents had violated his civil rights. He also asserted pendent claims for conversion, abuse of process, misappropriation of trade secrets, and interference with prospective economic advantage. His original Complaint in the federal action prayed for compensatory damages of $5 million together with attorneys' fees incurred in the state court case, as well as $10 million in punitive damages. The defendants sued in the federal lawsuit originally included, among others, three present and former in-house lawyers for the Agency and two law firms retained by the Agency at various times in connection with the state court litigation.

The District Court set a status conference for June 1, 1978, and the parties were directed to file status conference certificates before that date. One of the

law firms, appearing in propria persona, filed a certificate as directed, pointing out that petitioner was misusing the Civil Rights Acts and advising both petitioner and the Court that it intended to file a motion to dismiss. In response petitioner dismissed with prejudice his claims against both law firms and one of the in-house lawyers, none of whom are respondents herein.

Petitioner filed his First Amended Complaint which changed few of the allegations from his original Complaint. Having recognized the impropriety of his effort to misuse the Civil Rights Acts, petitioner sought to camouflage the fact that he was seeking federal review of state court rulings by deleting explicit references to the state court case. To this end, he deleted the state court Complaint as an exhibit to his First Amended Complaint in the federal action.

While this revision demontrated petitioner's awareness that the Civil Rights Acts provided no basis for his federal suit, he did not change the substance of his federal complaint at all, except to add a reference to BPIA v. Lynn, a lawsuit that had been resolved by stipulation with the approval of Judge Renfrew in 1974. The "Acts of Defendants" portion of petitioner's First Amended Complaint remained the same as in the original Complaint -- it continued to track the factual allegations of the state court Complaint and argued about the handling of the state court litigation. For example, paragraph 31 of the original federal Complaint alleged as follows:

> "The SFRA, through the combined efforts of defendants, retained possession of plaintiff's documents in direct violation of a Court order, dated April 21, 1976, and numerous document production requests made by plaintiff requiring production of plaintiff's business records in Gage v. SFRA."

After "amendment," these allegations re-appeared as paragraph 29 of the First Amended Complaint:

> "The SFRA, through the combined efforts of defendants, retained possession of plaintiff's documents in direct violation of a Court order which was dated April 21, 1976."

As with most of the First Amended Complaint, this "amendment" was thus a transparent attempt to conceal the true character petitioner's federal lawsuit -- a collateral appeal from adverse state court rulings. The only significant change was that the First Amended Complaint reduced the prayer to $1 million in actual damages plus $1 million in punitive damages.

Respondents thereafter filed motions to dismiss and/or strike the First Amended Complaint. After extensive briefing and several hearings, Judge Renfrew granted respondents' motion to dismiss and awarded

$2,000.00 in attorneys' fees as sanctions against petitioner and his attorney. See petitioner's Appendix D and Appendix E. As is reflected in Judge Renfrew's opinions, he concluded that the federal lawsuit was nothing more than an attempt to relitigate matters raised in and relating to the state court action. Judge Renfrew granted the motion to dismiss for several stated reasons, including that the claims were barred by the applicable statutes of limitations, that the First Amended Complaint did not state a valid claim under the Civil Rights Acts, and that the filing and prosecuting of the federal action was frivolous and in bad faith.

The Court of Appeals affirmed, holding that almost all of petitioner's claims accrued in or before 1974 and were therefore barred by the applicable statutes of limitations. The Court of Appeals also held that petitioner's remaining claim (i.e.

that respondents purportedly disobeyed an order in the state court litigation) did not state a claim under the Civil Rights Acts.

ARGUMENT OPPOSING ISSUANCE OF THE WRIT

I.
PETITIONER'S CLAIMS ARE BARRED BY THE APPLICABLE STATUTES OF LIMITATIONS

Petitioner's First Amended Complaint (paragraph 26) in the federal action alleges that he was evicted from Agency property pursuant to an unlawful detainer judgment in 1974. By 1974, he had already filed his Complaint in the State Court action, alleging that the Agency and its employees were conspiring to put him out of business. Since 1974, his only relation with the Agency has been as an adverse party in litigation. Yet the original Complaint in this action was filed on March 9, 1978, well over three years thereafter.

As Judge Renfrew held and the Court of Appeals affirmed, all of petitioner's purported Civil Rights Acts claims are therefore barred by the applicable statutes of limitations.

Of the federal statutes relied upon by petitioner, only section 1986 provides an explicit statute of limitations: "No action under the provisions of this Section shall be sustained which is not commenced within one year after the cause of action has accrued." Obviously, more than a year had passed between the alleged event and the filing of the federal lawsuit. Thus, petitioner's section 1986 claim is unquestionably time-barred.

Since there is no limitation period expressly prescribed for the remaining Civil Rights Acts, federal courts will apply the most closely analagous state statute of limitations. Bradshaw v. Zoological Society of San Diego, 569 F.2d

1066, 1068 (9th Cir. 1978). California Code of Civil Procedure § 338(1) provides a three year statute of limitations for "an action upon a liability created by statute, other than a penalty or a forfeiture." (See Appendix I.) Code of Civil Procedure § 338(1) therefore applies to the other purported Civil Rights claims asserted here because they are based "upon a liability created by statute." See Jackson v. Hayakawa, 605 F.2d 1121, 1127 (9th Cir. 1979) (Section 1983); De Malherbe v. International Union of Elevator Constructors, 449 F.Supp. 1335, 1345 (N.D. Cal. 1978) (Section 1981); Wiltshire v. Standard Oil Co., 447 F.Supp. 756, 764 (N.D. Cal. 1978) (Sections 1981 and 1983); Lim v. Citizens Savings & Loan, 430 F.Supp. 802, 817 (N.D. Cal. 1976) (Sections 1981 and 1983); Cross v. Board of Supervisors of San Mateo County, 326 F.Supp. 634 (N.D. Cal. 1968), aff'd 442 F.2d 362 (9th Cir.

1971) (Section 1985).[1/] Accordingly, all of petitioner's other purported Civil Rights claims are also time-barred and were properly dismissed.

II.
PETITIONER HAS FAILED TO STATE A VALID CLAIM UNDER THE CIVIL RIGHTS ACTS

Petitioner's purported Civil Rights claims are facially deficient because, as Judge Renfrew concluded and the Court of Appeals affirmed, his suit is a transparent attempt to obtain federal review of state court proceedings. The federal courts therefore lack subject matter jurisdiction because "the federal courts do not review State court civil proceedings under the

---

1/ As far as respondents have been able to determine, no California cases have yet ruled on the relevant statute of limitations for Section 1982. Since, like Sections 1981, 1983 and 1985, it involves "a liability created by statute," Calif. Code of Civil Procedure Section 338(1) should apply to Section 1982 cases as well, and the statute of limitations should therefore be three years.

guise of the Civil Rights Act." Fortune v. Mulherrin, 533 Fed.S. 21, 22 (1st Cir. 1976); Meyer v. Lavelle, 389 F.Supp 972, 976 (E.D.Pa. 1975); Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980). Thus, petitioner's attempt to relitigate events surrounding various state court proceedings cannot be elevated to a Civil Rights claim for the purpose of securing review by the federal courts.

One of petitioner's allegations requires particular consideration because it is the only allegation which even purports to be based upon events occurring within the statute of limitations period. Petitioner's First Amended Complaint (like his Petition for Certiorari, pages 20 and 25) accuses the Agency of misappropriating his documents and failing to produce them through discovery in the state court action. However, disputes about discovery rulings in state court proceedings do not

give rise to any valid Civil Rights claims. In Sarelas v. Porokis, 320 F.2d 827 (7th Cir. 1963), cert. denied, 375 U.S. 985 (1963), for example, the Court of Appeals affirmed the dismissal of similar purported Civil Rights claims. It noted that "the same claims of irregularities and abuses in taking depositions were presented to the [state] Circuit Court and passed upon by that court," 320 F.2d at 828, and held that no federal claim was stated:

> "Whether there were violations of the Illinois Supreme Court rules on discovery procedure did not present a question of deprivation of 'any rights . . . secured by the Constitution and laws ...' but a question of abuse of process in the taking of the depositions."

320 F.2d at 828. See also Bradt v. Smith, 634 F.2d 796 (5th Cir. 1981), appeal pending.

Moreover, petitioner did not even properly allege invidious discrimination or the violation of any Constitutional right.

Beyond alleging that he is black, petitioner made no allegations that the conduct about which he complained was directed at him because of his race or some other class-based animus. Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). Absent proper allegations of racial or class-based discrimination, the federal courts do not have jurisdiction under 28 U.S.C § 1343(c) to hear Civil Rights claims. Davenport v. Berman, 420 F.2d 294, 296 (2nd Cir. 1969).

Similarly, the claims that the Agency breached a lease or conducted the state court proceedings in a manner which was unsatisfactory to petitioner do not properly allege violation of any Constitutional right. Petitioner's vague references in his First Amended Complaint (paragraphs 13, 14 and 15(i)) to his rights to "due process" and "equal protection" do not satisfy this requirement. Conclusory allegations, unsupported by underlying facts, are insuf-

ficient to state a civil rights claim against public officials. As was stated in Reese v. Nixon, 347 F.Supp. 314, 316 (C.D.Cal. 1972), "Conclusions, including allegations couched in phrases like 'depravation of Constitutional rights' will not constitute a proper basis for a civil rights action." See also, for example, Finley v. Rittenhouse, 416 F.2d 1186, 1187 (9th Cir. 1969). The very vagueness of petitioner's claims demonstrates that they lack substance. Such vague allegations cannot convert state law claims into Civil Rights claims irrespective of whether the state law claims would be viable. Williams v. Gorton, 529 F.2d 668 (9th Cir. 1976). Here, petitioner has not even alleged adequate claims under state law.[2/]

2/ Each of petitioner's purported pendent claims was also deficient under California law. Judge Renfrew did not reach this issue because, having determined that no valid Civil Rights claim had been stated, he dismissed the state law claims for lack of pendent jurisdiction.

In his Petition for Certiorari, petitioner inexplicably argues that "There is no precedent for the requirement of national television coverage" for the filing of a Civil Rights action. Petition at 28. This silly argument (which was not even raised before the Court of Appeals) is based upon comments made by Judge Renfrew that petitioner has chosen to take out of context. Petitioner incorrectly argues that Judge Renfrew somehow indicated that an allegation of national television coverage was necessary to support a claim for violation of civil rights. So that this Court can evaluate petitioner's argument, we quote sufficient portions of the transcript to put Judge Renfrew's comments back into context.

> Mr. Zeldin [counsel for respondents]: This is not a civil rights case. This is a sideways attack on the state court judgments.

Mr. Dombroski [counsel for petitioner]: Your Honor, if I might just respond, I can't conceive of a better civil rights case in terms of the plaintiff's position.

The Court: Are you serious? Boy, I---

Mr. Dombroski: We have received---

The Court: -- Boy, you must not--you must be a very literal person and not very imaginative, because I can imagine a far better case and I'm sure you can, too. Wouldn't it be good to have your rights taken away and have that on national television and all kinds of things like that? I can think of a lot of better cases and I'm sure you can, too.

Mr. Dombroski: Well, the point is, Your Honor---

The Court: This is not a strong case.

R.T. 58-59.

III.
THE ACTION WAS PROPERTY DISMISSED UNDER RULE 11 AS HAVING BEEN FILED AND PURSUED IN BAD FAITH

Rule 11 of the Federal Rules of Civil Procedure explicitly prohibits the filing of a complaint in bad faith. Courts have

not hesitated to apply Rule 11 by striking a complaint when the record so requires. In Freeman v. Kirby, 27 F.R.D. 395 (S.D.N.Y. 1961), for example, the court struck a complaint as sham under Rule 11, stating that:

> An affirmative obligation is thus cast upon the attorney signatory to a pleading that he be satisfied, in good faith that there is good grounds to support the claim asserted therein.

27 F.R.D. at 397; see also, Ferrer Delgado v. Sylvia de Jesus, 440 F.Supp. 979 (D.P.R. 1976).

Petitioner filed his federal action while the state court litigation was still pending. (In fact, it was filed on the last business day before the state case was scheduled to be tried.) Under the circumstances, Judge Renfrew could and did reasonably infer that the federal action was filed merely for the purpose of intimidating respondents and their counsel, and

thereby gaining some collateral advantage in the state court litigation. See Petitioner's Appendix D, pages 11 and 14.

After the jury had returned a verdict in favor of the Agency in the state court case, one of the law firms named as a defendant in the federal action filed a status conference certificate informing petitioner that he could not obtain federal review of state court rulings. In response, petitioner dismissed his "claims" against the two retained law firms and one of the in-house attorneys. He also amended his Complaint without explanation to reduce the prayer from $15 million to $2 million and tried to camouflage the reliance of the federal First Amended Complaint upon the state court case. Petitioner nevertheless continued to assert claims against the Agency's Commissioners (none of whom was even in office when petitioner was a tenant of the Agency), even after Judge Renfrew

warned counsel for petitioner of the possible consequences of continuing prosecution of the litigation.

The above circumstances amply support Judge Renfrew's finding of bad faith. The most forceful support, however, comes from petitioner's own original Complaint in this federal action. Exhibit B to that Complaint was a deposition transcript of Dr. Richard Long, petitioner's own psychiatric expert in the state court litigation. Dr. Long's testimony repeatedly demonstrated petitioner's vexatious desire to punish individuals associated with the Agency, all of which was well known to petitioner and his counsel when this action was filed.

According to Dr. Long, petitioner was "a paranoid schizophrenic." R. T. 49. Dr. Long therefore doubted that petitioner could perceive events accurately during 1972-1974, when the events in question occurred. Most significantly, Dr. Long

graphically described petitioner's desire for revenge against the Agency for perceived wrongs:

> "He said that he would go into the Redevelopment Agency, and he said that people would laugh at him and that he felt that people were talking about him beind his back, and he said (quote) that 'They had stripped me of everything, that they had degraded me.'
>
> Again he at that time started talking about how Jesus was stoned before they crucified him.
>
> . . . .
>
> He said that he wanted somehow to destroy the individuals who had hurt him economically, like they had hurt him economically, and he wasn't sure whether there was a way they could go to jail. He wanted some type of vindication. He thought that maybe some way he could do that legally, but he wasn't sure."

R.T. 78-79; emphasis added.

Vengeance is not a proper motive for a frivolous Civil Rights action. In view of the above facts, Judge Renfrew was justified in finding that the action was filed

and prosecuted in bad faith. Accordingly, dismissal of the action was proper.

CONCLUSIONS

For the foregoing reasons, the Court should not grant Certiorari. The underlying action was without substance. It was filed to secure collateral advantage in the pending state court lawsuit and was pursued to secure federal review of that state court lawsuit. The claims asserted in petitioner's First Amended Complaint were barred by the applicable statutes of limitations. The federal courts lack subject matter jurisdiction because no proper claims under the Civil Rights Acts have been or could be asserted. And, the First Amended Complaint was properly dismissed under Rule 11 as having been filed and

pursued without legal justification and in bad faith.

Dated: November 9, 1980.

Respectfully submitted,

LEO E. BORREGARD
DAVID J. OSTER
MARK J. DOANE
LEWELL TOPEL
REDEVELOPMENT AGENCY OF
THE CITY AND COUNTY
OF SAN FRANCISCO

DINKELSPIEL, DONOVAN
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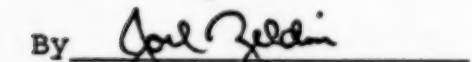
By 
Joel Zeldin
Attorneys for Respondent

APPENDIX I

California Code of Civil Procedure § 338. Three Years--Statutory Suit, Trespass, Trover, Fraud and Mistake, Official Bonds, Slander of Title.

Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

. . .

AFFIDAVIT OF SERVICE BY MAIL

State of California
City and County of San Francisco--ss.

Joel Zeldin, being first duly sworn says:

That affiant is a citizen of the United States, over 18 years of age, and not a party to the within cause; I have concurrently herewith applied for admission to the Bar of the Supreme Court of the United States; that affiant's business address is One Embarcadero Center, Suite 2701, San Francisco, California 94111; that affiant served the attached Opposition to Petition For A Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit, "Thomas Gage vs. Howard Wexler, Board Member of the San Francisco Redevelopment Agency, et al.," No. 81-767 on each of the following by placing the indicated number of copies in an envelope addressed to each as follows:

No. of Copies	Name and Address
3	James M. Dombroski, Esq. Suite 425, Russ Building 235 Montgomery Street San Francisco, CA 94104
40	Office of the Clerk Supreme Court of the United States Washington, D.C. 20543

That each of said envelopes was then, on November 9, 1981, sealed and deposited in the United States mail at San Francisco, California, with the first-class postage thereon fully prepaid; and that there is

delivery service by United States mail at each place so addressed, or that there is regular communication by mail between the place of mailing and each place so addressed, and that said mailing took place within the permitted time for filing.

Joel Zeldin

JOEL ZELDIN

Subscribed and sworn to before me this 5th day of November, 1981.

Katherine Inderkum

Notary Public in and for the City and County of San Francisco, State of California